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Supreme Court of the United States

OCTOBER TERM, 1946

No. 256

GLORE, FORGAN & CO.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, THE PULLMAN COMPANY, PULLMAN-STANDARD CAR MANUFACTURING COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR GLORE, FORGAN & CO., APPELLANT.

Introductory Statement.

The issues involved in this appeal are identical with those presented in Cases 253, 254 and 255 in which full briefs have been filed by the appellants in those cases. Jurisdiction of this Court in the four cases is based on Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345). Probable jurisdiction was noted in these cases on October 14, 1946 (R. 2639).

We will in the interest of brevity dispense with repetition of matters common to all the appeals and generally

confine this brief to points specifically relating to this appeal. In so doing, we desire to adopt the "Statement" and "Question Presented" appearing in the Government's brief (Case No. 253) and to add the following statement.

Statement of the Case with Respect to Glore, Forgan & Co., Appellant.

On March 22, 1945 and after hearing, the District Court entered an order authorizing Pullman, Incorporated to offer to treat with the railroads or others for the sale of the "Sleeping Car Business" of The Pullman Company or for the sale of that company's stock owned by Pullman, Incorporated (R. 958). Pursuant to order of court (R. 1063) entered October 19, 1945, Glore, Forgan & Co. was allowed to intervene and file its petition (R. 1056) containing the so-called "Glore Plan" to make effective the objectives of the decree of the District Court by sale of the Pullman Company Stock (R. 1058, printed in full, Appendix). The petition further prayed that the matter be set for an early hearing and that after hearing Pullman, Incorporated be authorized and directed to execute a formal agreement with petitioner in accordance with said proposal. On November 5-6, 1945, hearings were had on this and the three other plans submitted* (R. 2022).

Testimony of Charles F. Glore.

The only witness offered on behalf of the appellant herein was Mr. Charles F. Glore, who testified as follows (R. 2100-2109):

None of the members of Glore, Forgan & Co. is an officer or director of any railroad or any company engaged in the manufacture or sale of railroad supplies or equipment and none is an officer, director, or stockholder of Pullman, Incorporated, Pullman Standard Car Manufacturing Com-

*These were the Railroad Plan, the Otis Plan, and the Standard Steel Spring Co. Plan. No appeal was taken to this Court by that company.

pany or The Pullman Company, except that one of the members of the firm owned 100 shares of capital stock of Pullman, Incorporated.

The Glore Plan seeks to accomplish the objectives of the District Court decree by the sale to the public of the capital stock of The Pullman Company now owned by Pullman, Incorporated. The procedure contemplated was adopted in similar litigation by the District Court for the District of Columbia, in an anti-trust suit brought by the Government, in which Swift & Co. was ordered to dispose of its stock in Libby, McNeill & Libby, and the Court approved a distribution to the public of the capital stock of Libby, McNeill & Libby through Glore, Forgan & Co. and other associated underwriters.* Such distribution was accomplished in accordance with the terms of an underwriting contract quite similar to that which is proposed by Glore, Forgan & Co. for the distribution of the Pullman stock.

In substance, the underwriters will pay Pullman, Incorporated, for its shares of capital stock of The Pullman Company an amount approximately equal to the net book value of the assets of The Pullman Company, and will sell such shares of capital stock to the public at such price, plus a usual and customary underwriter's commission.

The District Court, cognizant of the public interest in adequate and uninterrupted sleeping car service should be particularly interested in the financial structure of The Pullman Company after the sale of its stock by Pullman, Incorporated. Under this proposal The Pullman Company would have an equity capital of approximately $20,000,000 based on the premise that the railroads will decide to purchase the light-weight sleeping car equipment presently owned by The Pullman Company. The Company would also have a bank debt of about $20,000,000. A commitment has been obtained from the Chase National Bank to make a bank loan. With such a substantial equity capital in relation to debt, The Pullman

* Order entered July 8, 1933 (United States v. Swift & Co., Equity No. 37623), found in Vol. 2, Decrees and Judgments in Federal Antitrust Cases.

Company would be able to procure additional funds through either equity or debt financing, or a combination of both, to buy needed requirements of new and improved sleeping cars. It is vitally important for the long-term continuity of satisfactory sleeping car service that The Pullman Company have such a sound and strong capital structure. Provision is made for quick repayment of the bank debt. It is contemplated that The Pullman Company will start operations with a working capital of $2,500,000. While there may be doubt, particularly in view of possible increases in the general price level, as to the adequacy of that amount of working capital, this figure was used since such an amount had been suggested as adequate by The Pullman Company.

If, after further study, it should appear that more working capital is required, it would be a simple matter to provide it. An important feature of the proposal is that The Pullman Company will be owned by the public and not by a holding company, and thus there will be no possibility of manipulating or exploiting The Pullman Company for the benefit of a corporate parent.

To carry out the offer to Pullman Incorporated, there has been formed the nucleus of an underwriting group consisting of more than forty investment banking firms and corporations, none of which is believed to have any important investment banking connection with Pullman, or with the railroad industry generally.

The banking firms and corporations comprising the underwriting group are as follows (Glore Ex. 1, R. 2310):

Glore, Forgan & Co., A. C. Allyn and Company, Inc., Bacon, Whipple & Co., A. G. Becker & Co., Incorporated, William Blair & Company, Blyth & Co., Inc., Central Republic Company, Julien Collins & Company, Paul H. Davis & Co., Eastman, Dillon & Co., Farwell, Chapman & Co., The First Boston Corporation, Graham, Parsons & Co., Harris, Hall & Company (Incorporated), Hayden, Stone & Co., Hemphill, Noyes & Co., Hornblower & Weeks, W. E. Hutton & Co., The Illinois Company, Kalman & Company, Inc.

Kebbon, McCormick & Co., Kidder, Peabody & Co., Ladenburg, Thalmann & Co., W. C. Langley & Co., Lazard Freres & Co., Lehman Brothers, Loewi & Co., Merrill Lynch, Pierce, Fenner & Beane, The Milwaukee Company, Mullaney, Ross & Company, Maynard H. Murch & Co., Paine, Webber, Jackson & Curtis, Reinholdt & Gardner, E. H. Rollins & Sons, Incorporated, Shields & Company, Stone & Webster and Blodget, Incorporated, Spencer Trask & Co., Tucker, Anthony & Co., G. H. Walker & Co., Werthein & Co., White, Weld & Co., The Wisconsin Company, Dean Witter & Co.

It is intended that the Board of Directors of The Pullman Company will be selected from the present executive and operating personnel of The Pullman Company and from independent and outstanding businessmen engaged in other industries. If desired by the Court, a panel of proposed directors may be submitted to the Court at the appropriate time for its approval. The Board of Directors will thus have the benefits of persons familiar with the sleeping car business and of persons who will bring to The Pullman Company the benefit of their experiences in other industries. No member of the Board of Directors will be an officer or director of Pullman, Incorporated, or of Pullman Standard Car Manufacturing Company or of any railroad corporation or of any corporation engaged in the manufacture of sleeping cars or other supplies and equipment for railroad companies.

An important feature of the Glore Forgan proposal is its flexibility in so far as the railroads are concerned. Thus, the plan contemplates that the railroad companies which wish to own their own sleeping car equipment may elect to do so, and that those railroad companies which do not wish to own their own sleeping car equipment will have available for their use equipment owned by The Pullman Company. In addition, the railroads which elect to own their own equipment will also have available to them equipment from the Pullman pool of sleeping cars to meet their

peak requirements, if they so desire. In any event, it is contemplated that a uniform service of the highest quality would be provided for the sleeping car equipment of all the railroads.

All of the plans before the District Court appear to be conditioned upon the procuring of satisfactory service contracts with a substantial number of railroads. Unless the railroads themselves purchase The Pullman Company, the railroads will enter into substantially the same type of contract with The Pullman Company whether the Glore plan or any of the others is adopted.

The underwriters will offer the capital stock of The Pullman Company to the public, and the proposal is subject to the condition that the capital stock of The Pullman Company be registered under the Securities Act of 1933, and to the further condition, generally customary in public underwritings involving an unusual time element, that the underwriters may terminate their agreement to purchase, if market conditions become such that it is inadvisable to make a public offering.

Under the proposal, The Pullman Company will be without obligation to, or control by, any manufacturing company, and will be free to purchase sleeping cars in the open market in arms length bargaining. Moreover, The Pullman Company will furnish sleeping cars from its pool or sleeping car service to any railroad requesting such cars or service, without favoring any railroad or group of railroads. The Pullman Company, in the interest of a distinctly quality service to the public, will cooperate with all railroads and all car manufacturers in developing the best types of sleeping cars.

The Glore Plan specifically contemplates that there shall be no disturbance in existing labor contracts or other employee rights or relationships. Among other things, it is intended that the present system of group insurance and pension benefits be retained. Finally, it contemplates that there shall be no interruption in the services now being performed for the railroads by The Pullman Company.

The "market out" clause in the proposal (Appendix, p. 28) amounts to the right to refuse to offer the shares if market conditions for some unforeseen reason made it advisable to do so. Glore, Forgan & Co. has never relied on such provision although such clause is generally used in underwriting contracts. The Glore Forgan offer was also conditioned on the execution of operating contracts between The Pullman Company and the railroads. In order to make a satisfactory public offering, which could be recommended to the public by Glore, Forgan & Co. and its associates there must be assurances of operating contracts with a substantial number of railroads, and the plan contains the statement that a satisfactory operating agreement would be one like that suggested by The Pullman Company under date of September 15, 1945, or in such other form as may be satisfactory to Glore, Forgan & Co. Assurance of financial support for The Pullman Company after the proposed public offering had been marketed would be achieved by the execution of such contracts with the railroads. While Glore, Forgan & Co. might not retain any substantial interest in The Pullman Company if the underwriting were successful, there would be "a very strong moral obligation" upon that firm, as head of the underwriting group, with respect to the maintenance of proper management for The Pullman Company (R. 2109).

The District Court on December 18, 1945, rendered its opinion* approving the plan submitted by the railroad buying group (R. 1193), and thereafter a final order was entered by that Court on January 4, 1946, in accordance therewith (R. 1203). This appeal was taken from such order (R. 1226), and an order was entered by the District Court allowing the appeal on March 6, 1946 (R. 1227). The Statement of Points and Designation of Record on this appeal was filed on July 15, 1946 (R. 2635).

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* In so holding, the District Court made the following comments with respect to the other plans:

"Approval of the sale to the railroads does not imply disapproval of other bidders. We are much impressed with all of them." (R. 1199) * * * We think the variety of choice presented is a credit both to the ingenuity of those who thought up the various plans and to the lawyers who have presented them to the Court." (R. 1195)

SPECIFICATIONS OF ERRORS.

The following assignment of errors was made by Appellant (R. 1228):

1. The District Court erred in entering its final order and decree of January 4, 1946.

2. The Court erred in approving the sale of The Pullman Company to a combination of railroads generating on their lines substantially all of the sleeping-car business in the United States.

3. The Court erred in failing to hold that sale of The Pullman Company to a combination of railroads generating on their lines substantially all of the sleeping-car business in the United States would substitute a new monopoly for the monopoly struck down by the Court.

4. The Court erred in approving a sale which will eliminate all competition in the operation and servicing of sleeping cars.

5. The Court erred in approving a plan which will deprive the railroads in the United States of the opportunity of using an independently-owned sleeping-car pool.

6. The Court erred in delegating to a combination of railroads generating on their lines substantially all of the sleeping-car business in the United States and selected by defendant Pullman, Incorporated to be the present purchaser of The Pullman Company, the power to select, after a period not to exceed three years, a new purchaser of that company.

7. The Court erred in refusing to hold that the offer of Glore, Forgan & Co. for the purchase of The Pullman Company would eliminate the monopoly which the Court had condemned, would most effectively dissipate the effects of such monopoly, and would be in the public interest.

ARGUMENT.

In view of the full and complete discussion contained in briefs of the appellants in Cases 253, 254 and 255 of the various points encompassed within 1-6 inclusive of the above assignment, the argument in this brief will be limited to a discussion of the point covered by 7.

At the outset, however, we wish to briefly point out that the sale of The Pullman Company contemplated by the Railroad Plan approved by the District Court *will create a new monopoly and will be an obstacle to the attainment of the objectives and purposes of the final judgment of the District Court.* The purchase of the stock of The Pullman Company by railroads which carry approximately 85% of sleeping-car passengers would in effect constitute an agreement not to do business with anyone furnishing or servicing sleeping-cars except The Pullman Company. The railroads which are parties to the Railroad Plan are not likely to contract for the use of sleeping-cars or for sleeping-car services with any other company so long as they own or control The Pullman Company. An arrangement among buyers to deal only with one seller is abhorent to the principles of the Sherman Antitrust Act. Those who enter into such an arrangement voluntarily restrain themselves from independent dealings, and involuntarily, restrain existing or prospective competitors from a free and open market.*

To strike down one monopoly only to set the stage for the creation of another would not be in the public interest. We submit that the Railroad Plan would result in a

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* Addyston Pipe & Steel Co. v. United States, 175 U. S. 211; 20 S. Ct. 96; 44 Law Ed. 136 Montague & Co. v. Lowry, 193 U. S. 38; 24 S. Ct. 307; 48 Law. Ed. 608; Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U. S. 600; 34 S. Ct. 951; 58 Law. Ed. 1490; Anderson v. Ship Owners Assn., 272 U. S. 359; 47 S. Ct. 125; 71 Law. Ed. 298; Paramount Famous Lasky Corp. v. United States, 282 U. S. 30; 51 S. Ct. 42; 75 Law. Ed. 145; United States v. First National Pictures, Inc., 282 U. S. 44; 51 S. Ct. 45; 75 Law. Ed. 151; Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457; 61 S. Ct. 703; 85 Law. Ed. 949; American Medical Assn. v. United States, 317 U. S. 519; 63 S. Ct. 326; 87 Law. Ed. 434. See also, American Tobacco Co. v. United States, 328 U. S. 781; United States v. Aluminum Co. of America, 148 F. 2d 416 (CCA 2).

monopoly as complete as the one which the District Court sought to eliminate and we therefore fully concur in the Government's argument as to the action of the District Court in this regard. We refrain, however, from any further discussion of this important question so fully covered in the other briefs and shall emphasize the merits of the Glore Plan as the best device for making the Final Judgment of the District Court entered May 8, 1944 fully effective.

I.

The Glore Plan Affords an Appropriate and Simple Method for Completely Separating Pullman's Sleeping Car Business from Its Manufacturing Business.

The Glore Plan provides for the purchase by a responsible underwriting group of all of the outstanding shares of capital stock of The Pullman Company and the resale of such shares by the underwriting group to the public. Such a procedure is simple, effectually carries out the purposes of the Sherman Act and has met the test of practicability since it was successfully used in litigation of a similar character when Swift & Co. was ordered by the District Court for the District of Columbia to dispose of its stock holdings in Libby, McNeill & Libby (p. 3, *supra*). Under this procedure the separation of Pullman's Sleeping Car Business from its Manufacturing Business will automatically occur upon the date of purchase by the underwriters.

While there are three conditions to the performance of the Glore Plan none of them will militate against the efficacy and completeness of the separation ordered by the District Court. These provisions are: (a) the condition that Pullman Incorporated cause the capital stock of The Pullman Company to be registered under the Securities Act of 1933; (b) the condition that contracts be entered into between The Pullman Company and such number of railroads as may be

satisfactory to Glore, Forgan & Co.; and (c) the so-called "market out" clause.

Condition (a) is a statutory requirement which cannot be avoided if there is to be a public distribution of stock of The Pullman Company. This condition was met in the Libby, McNeill & Libby matter, and has been satisfied by hundreds of corporations which have effected the sale of their securities to the public.

Condition (b) was occasioned by the action of The Pullman Company in cancelling its operating contracts with the railroads. The assets of The Pullman Company have no value other than their value on liquidation unless there are in existence contracts with railroads for the use of such assets. The Pullman Company would no longer be engaged in the Sleeping Car Business without such contracts, and the purpose of condition (b) is that there be a Sleeping Car Business recreated prior to the stock purchase. Nothing less than this will carry out the provisions of the Final Judgment, which the District Court held in 50 F. Supp., p. 137 (R. 744) should require The Pullman Company "to *operate* and service sleeping cars" and also "to *furnish* through-line sleeping car service." So far as the railroads are concerned, many of them, as the District Court has said, have no "possible alternative for other sleeping car arrangements except a contract with The Pullman Company on the best terms that can be secured." (50 F. Supp., p. 131, R. 737.)

The mere fact that the Railroad Plan contemplates liquidation of the Sleeping Car Business is of itself sufficient to condemn that Plan. The interests of the traveling public forbid any such action.

Condition (c) is a condition which is customarily in underwritings involving an unusual time element. A similar condition was included in the underwriting agreement relating to the public sale of the stock of Libby, McNeill & Libby. The justification for it is that the underwriters are

acting merely as a conduit for distribution of the capital stock of The Pullman Company to the public and the underwriters' compensation is limited to a normal and customary underwriting discount. Underwriters enter into underwriting agreements on the basis of existing market conditions and should not be expected to proceed if a substantially adverse change in market conditions occurs. The possibility of events occurring which would warrant the exercise of a "market out" clause is remote under present and prospective market conditions but, if exercised, the sale could be postponed until market conditions improve, or the Court could retain jurisdiction to enforce some other method of disposition if sale to the public be abandoned.

The Glore Plan is, we submit, the simplest method of accomplishing the purposes of the Final Judgment.

II.

The Glore Plan Does Not Contemplate Liquidation of The Pullman Company and Provides for Adequate Capitalization so as to Permit Its Continuance of the Sleeping Car Business.

Under the Glore Plan The Pullman Company would have an equity capital of approximately $20,000,000 and a bank debt of about $20,000,000. The bank debt, in effect, evidences the price payable to Pullman Incorporated for The Pullman Company's fleet of heavy weight cars. This bank debt will be self-liquidating through cash accumulated on account of depreciation charges on heavy weight cars or by the "put-back" of heavy weight cars to Pullman Incorporated at their depreciated investment cost. Only such heavy weight cars would be so sold to Pullman Incorporated as were not needed for regularly assigned service or pool operations.

The capitalization of The Pullman Company provided by the Glore Plan permits its continuance as a vital and effective factor in the field of sleeping car transportation. With a self-liquidating bank loan and

$20,000,000 of equity capital, as provided by the Glore Plan, The Pullman Company will be in position to finance the acquisition of much needed modern sleeping cars for pool and through-line operation and for assignment to such railroads as may not wish or be able to purchase modern sleeping cars for their own account. The continuance of The Pullman Company as a potential and independent buyer of sleeping cars is obviously an essential to a free competitive market for manufacturers of sleeping cars. The Pullman Company, if strongly financed, as indicated above, would, in addition to its pool and through-line requirements, represent the mass purchasing power of all those railroads which wished to use, in regular operations, sleeping cars owned by The Pullman Company. Thus, as The Pullman Company is perpetually restrained by the Final Judgment from having interlocking directors with railroads or car manufacturers, there would be competition in the purchase of sleeping cars between The Pullman Company and the few large railroads who desire to own their own sleeping cars.

If, however, The Pullman Company is to be liquidated to a point where it will either own no sleeping cars or only acquire castoff, secondhand sleeping cars of the larger railroads, then the only market for new sleeping cars will be the larger railroads. There are interlocking directorates between certain railroads who are large users of sleeping cars and certain manufacturers of sleeping cars.

III.

Under the Glore Plan The Pullman Company Will Not Be Dominated by Its Railroad Customers and Will Be Independently Owned and Managed.

Under the Glore Plan it is intended that the Board of Directors of The Pullman Company will be initially selected from the present executive and operating personnel of The Pullman Company and from independent and outstanding business men engaged in other industries. The Board will

thus have the benefit of the advice and guidance of persons thoroughly familiar with the sleeping car business and of persons who will bring to The Pullman Company the benefit of their experience in other industries. A panel of proposed directors will be submitted to the Court for its approval, if desired. No member of the board will be an officer or director of Pullman Incorporated or any of its retained subsidiaries, or of any railroad corporation, or of any corporation engaged in the manufacture of sleeping cars or other supplies or equipment for railroad companies (R. 2102). This type of management will assure capable and independent operation by The Pullman Company for the benefit of all of its railroad customers and in the interest of the traveling public.

Both the Railroad Plan and the Otis Plan have the serious defect of likely domination of The Pullman Company by certain groups of railroads, for if such railroads are in a position to direct the pooling and shifting of cars and other management policies of The Pullman Company they will be under constant temptation to use such power to further their own interests whenever a conflict may arise between their interests and that of other railroads.

Approval of the Glore Plan will result in a nation-wide distribution of the capital stock of The Pullman Company. Thereafter the public holders of such stock will be the persons ultimately empowered to select, from year to year, the Board of Directors and, through it, the independent management of The Pullman Company. This is the manner in which management is selected for many large corporate enterprises.

IV.

The Glore Plan is the Only Method Submitted to the Court Which Will Provide the Foregoing Advantages, and Gives Full Effect to the Final Judgment.

Briefly summarized, the important advantages of the Glore Plan are (1) practicability and simplicity of consummation, (2) strong and sound capitalization, (3) continuance of ownership of sleeping cars, and (4) independent management. Each of the other plans submitted to the District Court by other parties to the instant appeals lacks one or more of such essential advantages.

The Otis Plan.

The Otis Plan has the disadvantage of placing the ownership of The Pullman Company in persons having a controlling interest in the Chesapeake & Ohio Railway Company, The New York, Chicago & St. Louis Railroad Company, and Pere Marquette Railway Company and who are working to increase their interest in other lines. Such railroads, although large enterprises in themselves, constitute only a small part of the total railroad industry. The relationships between the railroad group sponsoring the Otis Plan and the group of railroads sponsoring the Railroad Plan appear to be far from harmonious. Obviously, the greater part of the railroad industry may assume, rightly or wrongly, that the persons controlling The Pullman Company under the Otis Plan will seek to use such control to further the economic interests of the railroads controlled by such persons at the expense of other railroads. This will not be conducive to the creation of a vigorous and independent Pullman Company, as the District Court's Final Judgment requires and such as is necessary to destroy the condemned monopoly in the interests of the traveling public.

The Otis Plan cannot be made to comply with the Final Judgment. Paragraph 28 of the Final Judgment (R. 772) states:

"28. From and after the separation of the Sleeping Car Business from the Manufacturing Business, Pullman shall not employ, or elect, or permit to continue in office, as an officer or director of Pullman, any person who is also an officer or director of any railroad company that offers sleeping car service to the public on any of its lines."

Under the Otis Plan Messrs. Kirby and Young are personally to pay for and own part of the capital stock of The Pullman Company and Otis & Co. is to pay for and own the remainder. (R. 2039). Messrs. Kirby and Young and certain of the officers and directors of Otis & Co. are directors or officers or both of important railroads. The intent of paragraph 28 of the Final Judgment will not be satisfied by having Messrs. Kirby and Young, and Otis & Co. appoint nominees, even though nominally not otherwise connected with a railroad, to the Board of Directors of The Pullman Company, as was suggested by Mr. Daley, the President of Otis & Co. (R. 2043).

The testimony offered in support of the Otis Plan is not very explicit as to whether The Pullman Company under that plan would be a debtor to the extent of between a minimum of $20,000,000 and a maximum of $55,000,000 to Pullman Incorporated. (R. 2038). If it were such a debtor, the provisions of paragraph 14 of the Final Judgment would be violated. The record is silent as to how Messrs. Kirby and Young, and Otis & Co. propose to raise between a minimum of $40,000,000 and a maximum of $75,000,000, in cash, which would have to be raised if a debtor-creditor relationship between The Pullman Company and Pullman Incorporated is not to exist under the Otis Plan.

The Railroad Plan.

The Railroad Plan does not comply with paragraph 28 of the Final Judgment. Under the Railroad Plan, the offi-

cers and directors of The Pullman Company will be officers and directors of, or nominees of, railroad companies.

By December 31, 1948 The Pullman Company, under the Railroad Plan, is to be liquidated to a point where it will serve no function other than to service sleeping cars owned by the various railroads. (See, page 5 of Exhibit D to the Railroad Plan. R. 1164) This asserted intention to liquidate The Pullman Company squarely raises the following important question: Did the District Court intend in its Final Judgment that a going Sleeping Car Business be disposed of in a manner which gave some promise of the continuance of a Sleeping Car Business by The Pullman Company or, on the contrary, did the District Court intend that the purposes of the Final Judgment could be met by what amounts to a liquidation of The Pullman Company? In commenting on pool operations the District Court said (50 F. Supp. 131, R. 735-6):

> "For instance, the Florida East Coast Railway's requirements may vary from 319 cars in the height of the season to 28 in the dull season. Conversely, those of the Boston & Maine go from a maximum of 173 in summer to a minimum of 54 in winter. The pool of sleeping cars that can be shifted from one road to another as demands vary is called for by sound economic policy."

What is to happen to the pool requirements of the above referred to railroads and other railroads if the proponents of the Railroad Plan succeed in their program of liquidation of The Pullman Company? The Final Judgment gave Pullman Incorporated the right to elect to dispose of either the Manufacturing Business or the Sleeping Car Business as carried on when the Final Judgment was entered. Approval of the Railroad Plan would result in a third election not given or permitted by the Final Judgment, i.e., the election to liquidate The Pullman Company. We submit that this third election is entirely inconsistent with the District Court's opinion and Final Judgment.

V.

The District Court in Bringing About Compliance with Its Final Judgment Entered on May 8, 1944 Requiring Defendants "To Separate Completely and Perpetually the Sleeping Car Business from the Manufacturing Business" Had the Power and Was Also Under Duty to Disapprove Any Plan Failing to Meet the Objectives of the Sherman Act. Accordingly the District Court Should Have Approved a Plan of Separation Which Will Fully Effectuate Such Objectives.

In the enactment of the Sherman Act Congress delegated to the courts a broad power of enforcement. The only limitation on such power is that the remedy announced in each case shall bear a reasonable relation to the broad objects of the Sherman Act, namely, freedom of competition. Accordingly, the remedy to be prescribed varies with the circumstances in each case.

The District Court in its Supplementary Opinion Sur Form of Judgment (R. 759, 760) in this case used this language:

> "Separation is not an end in itself; it is a means to provide an open market."

Under the law, as the District Court recognized, it is not only within the power of the court, but is also the duty of the court as well, to grant relief adequate to the necessities of each case.

This Court has held that not only is the power vested in the court to strike down a particular violation of the Sherman Antitrust Act found to have existed, but to so frame its decree as to prevent a continuation of the same restraint in any form. *United States* v. *Freight Association*, 166 U. S. 290.

The principle has also been announced that the court may go beyond a general prohibition against a continuation of the same conspiracy in a different form and may enjoin specific classes of action by which the defendant might

evade the purpose of an injunction. *Local 167* v. *United States*, 291 U. S. 293. The courts have consistently reserved jurisdiction of a cause in which they have rendered a decree in order to prevent possible evasion of its decree so that any inadequacy therein may be remedied and the purpose thereof fully achieved. *Sugar Institute* v. *United States*, 297 U. S. 553.

In *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, this Court said:

> "The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival."

The Court there held that it was not only within the power of the District Court but that it was the affirmative duty of such court to so frame its decree as to preclude any revival of the unlawful practices found, and that in so doing the court could properly enjoin acts in themselves lawful when done for an unlawful purpose.

In *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, this Court, in addition to reaffirming the principles established by earlier cases, noted that Congress provided no administrative agency for the enforcement of the anti-trust law, and concluded that by the power of injunction bestowed upon the federal courts, Congress intended to vest them with broad power to do, within the scope of the machinery available to them, everything which Congress itself might reasonably do to stamp out and prevent the recurrence of unlawful restraint and monopoly.

In conformity with the principles laid down in the foregoing decisions it is wholly proper for a court, having decided that a dissolution of a corporate combination is essential, to leave the plan of dissolution to be worked out by the interested parties, subject to the power of the court to approve or disapprove any suggested plan, and, in the event no satisfactory plan shall be presented, to accomplish the dissolution itself by the appointment of a receiver.

In *Northern Securities Co.* v. *United States*, 193 U. S. 197, and *Harriman* v. *Northern Securities Company*, 197 U. S. 244, we find precedent for the principle that in supervising such dissolution the courts will give preference to a plan which leads to no unlawful concentration of control over an alternative plan, which, although accomplishing the specific dissolution required, creates a situation which might well lead to another and equally objectionable restraint on competition.

This principle is also announced in *United States* v. *St. Louis Terminal R. R. Ass'n*, 224 U. S. 383. This case illustrates a situation where a defendant is given an opportunity to work out a plan which will eliminate the restraint of trade found to have existed, but in which the court reserves the power to reject any plan which seems inadequate, and, upon the failure of the parties to present any acceptable plan, to use its power to design and enforce an adequate remedy.

In *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, this Court, in reversing the District Court, found that an acquisition by the Union Pacific of stock in the Southern Pacific created an unlawful restraint of competition and discussed at length the legal principles involved with respect to the relief to be granted, and in *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 470, the Court in fact rejected a plan which was submitted pursuant to the mandate of the court in *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61. These companion cases indicate very clearly the power of the District Court, under circumstances similar to those present here, and forcefully sustain the power and the duty of a court, which has decreed the dissolution of an unlawful corporate combination, to examine and pass upon all proposed plans for carrying out the dissolution, and to reject any such plan which, although dissolving the particular combination previously existing, renders likely the perpetuation of the unlawful power sought to be eradicated in a new form or combination.

The District Court in the instant case was therefore clearly bound to disapprove any plan not likely to dissipate the effect of the practices it has condemned as unlawful, and should also provide an appropriate method for effectively carrying out the objectives and purposes of the antitrust laws. And as we have shown, the Glore Plan effectuates the desired result in the simplest and most practicable manner.

CONCLUSION.

Appellant Glore Forgan & Co. respectfully submits that the order of January 4, 1946 appealed from should be reversed, and remanded with directions that its Plan be approved and that Pullman, Incorporated enter into a contract with Appellant for the sale of the stock of The Pullman Company as provided therein.

Respectfully submitted,

LEO F. TIERNEY
CARLOS A. SPIESS
LOUIS A. KOHN
231 South LaSalle Street,
Chicago, Illinois
Attorneys for Glore, Forgan & Co., Appellant

February 17, 1947

MAYER, MEYER, AUSTRIAN & PLATT
Chicago, Illinois
of Counsel

APPENDIX.

GLORE, FORGAN & CO. PROPOSAL*

October 11, 1945.

Pullman Incorporated
Pullman Building
79 East Adams Street
Chicago 4, Illinois

Attention Mr. D. A. Crawford, President

Gentlemen:

The undersigned, Glore, Forgan & Co., propose to organize a group of underwriters, of which Glore, Forgan & Co. will be one, to purchase from Pullman Incorporated all of the outstanding capital stock of The Pullman Company presently owned by Pullman Incorporated and to make a public distribution of such stock.

This proposal is subject to the following conditions:

1. The price to be paid by the underwriters for such shares of capital stock of The Pullman Company shall be the excess of the book value (adjusted in respect of fully depreciated heavy weight tourist-class sleeping cars to give effect to a value of $2000.00 per car) of all assets, other than obsolete inventory, of The Pullman Company (less depreciation reserves accumulated with respect to such assets from charges into operating expense) over all liabilities, determined as to amount, except capital stock, surplus and reserves not allocated to any specific purpose, all as determined in accordance with generally accepted principles of accounting practice. In making such computation there shall be included in said liabilities the principal amount of the bank loan referred to in Paragraph 2. The foregoing computation shall be made from a balance sheet, prepared by independent certified public accountants approved by the undersigned, as of the end of the fiscal quarter preceding

* Exhibit A to Intervening Petition of Glore, Forgan & Co., filed October 13, 1945 (R. 1056, 1058).

the Delivery Date with appropriate adjustments (a) for earnings or losses for the period subsequent to the date of the balance sheet and prior to the Delivery Date, (b) for outstanding minority interests, if any, in capital stock of The Pullman Company, and (c) for distributions to Pullman Incorporated by way of dividend or otherwise (other than the dividend referred to in Paragraph 2) made subsequent to the date of the balance sheet and prior to the Delivery Date.

The sale price to the public of the shares of capital stock so acquired by the underwriters shall be the purchase price thereof plus a usual and customary underwriters' commission.

2. Prior to the Delivery Date the undersigned will obtain a commitment from one or more banks to loan The Pullman Company, immediately prior to the Delivery Date, an amount of money equivalent to the net value at which heavy weight standard-class sleeping and composite cars and heavy weight tourist-class sleeping cars (herein sometimes called "heavy weight cars") then owned by The Pullman Company were computed in the determinations made pursuant to Paragraph 1. Such loan will be repayable in annual or semi-annual installments. Prior to the Delivery Date The Pullman Company will distribute the proceeds of such loans as an ordinary or liquidating dividend to Pullman Incorporated. At the Delivery Date Pullman Incorporated will deposit such dividend in escrow under the Escrow Agreement referred to in Paragraph 3. The Escrow Agreement will provide that moneys so deposited may be withdrawn from time to time by Pullman Incorporated to the extent of $250 per quarter for each heavy weight car not theretofore tendered to Pullman Incorporated and any of said deposit not at the time so subject to withdrawal by Pullman Incorporated shall stand as security (subject to withdrawal from time to time to the extent of the performance by Pullman Incorporated of the hereinafter mentioned obligation) for an obligation of Pullman Incorporated to

purchase from The Pullman Company all or any heavy weight cars tendered from time to time by The Pullman Company to Pullman Incorporated at prices equal to the greater of their depreciated investment cost at the time of the tender or their then scrap or salvage value.

3. At the Delivery Date Pullman Incorporated, The Pullman Company and a depositary to be designated by the undersigned shall enter into an Escrow Agreement providing for the deposit and withdrawals referred to in Paragraph 2 and providing further for the deposit by Pullman Incorporated out of the purchase price of the shares of capital stock sold by it of the maximum aggregate amount (but excluding any amount treated as a liability in making the computations provided by Paragraph 1) which may become payable, as determined by said independent certified public accountants, by The Pullman Company in respect of the following:

(i) The Pullman Company's liability for Federal Income and Excess Profits Taxes or deficiencies therein from January 1, 1938 to the Delivery Date;

(ii) The Pullman Company's liability for contract settlements with all railroads with which The Pullman Company has had contracts providing for the hauling of its sleeping and other cars based on operations up to the Delivery Date;

(iii) The Pullman Company's liability to Defense Plant Corporation for linen, blankets and supplies furnished by Defense Plant Corporation for the first twelve hundred special troop sleeping cars leased to The Pullman Company;

(iv) The Pullman Company's liability for ticket sales balance from October 1, 1941 to the Delivery Date covering the value of all tickets purchased during said period and not used up to the Delivery Date;

(v) The Pullman Company's liability by reason of acts done or omitted to be done by it on or before the Delivery Date consisting of (a) liabilities asserted or which may be asserted in claims or suits against The Pullman Company and (b) any and all contingent liabilities arising out of The Pullman Company's operations prior to the Delivery Date.

Pullman Incorporated may withdraw from time to time interest on securities in which the funds deposited under the Escrow Agreement may be invested. The Escrow Agreement shall provide that upon final determination of the foregoing undetermined liabilities the depositary shall deliver to The Pullman Company the amount so determined to be owing by The Pullman Company together with expenses incurred by The Pullman Company in the determination thereof. Provision will also be made for periodic recomputations of said undetermined liabilities as a basis for the withdrawal by Pullman Incorporated of not to exceed 75% of any excess deposits made in respect of undetermined liabilities until no undetermined liabilities remain. When no undetermined liabilities remain, Pullman Incorporated may withdraw the remainder of the amounts deposited in respect of undetermined liabilities.

4. Prior to the Delivery Date the undersigned shall have obtained commitments from a number of railroads satisfactory to the undersigned to enter into contracts with The Pullman Company in substantially the form of the draft contract and supplement thereto (your draft of September 15, 1945) heretofore submitted to the railroads or in such other form as may be satisfactory to the undersigned. Each such contract shall be for a period and provide for payments satisfactory to the undersigned.

5. Pullman Incorporated shall have caused The Pullman Company to register under an appropriate Registration Statement, prior to the Delivery Date, the subject shares of capital stock under the Securities Act of 1933, as amended,

for sale to the public and no stop order shall have been issued under said Act or proceeding therefor instituted by the Securities and Exchange Commission prior to the Delivery Date.

6. At the Delivery Date the undersigned shall have received from counsel for Pullman Incorporated an opinion, in form and substance satisfactory to Messrs. Mayer, Meyer, Austrian & Platt, to the effect that:

(i) The Pullman Company is a validly organized and existing corporation under the laws of the State of Illinois and is duly authorized to transact business as a foreign corporation in all states of the United States in which it transacts an intrastate business;

(ii) The Registration Statement referred to in Paragraph 5 has become, and at the Delivery Date is, effective under the Securities Act of 1933, as amended, and that, to the best of the knowledge of said counsel, no proceedings for a stop order are pending or threatened under Section 8 (d) of said Act;

(iii) The aforesaid Registration Statement and the related Prospectus comply as to form with the Securities Act of 1933, as amended, and with the rules and regulations of the Securities and Exchange Commission thereunder;

(iv) The shares of capital stock of The Pullman Company deliverable hereunder constitute duly issued, fully paid and nonassessable shares and the certificates evidencing said shares fully conform to all legal requirements of The Business Corporation Act of The State of Illinois; and

(v) Pullman Incorporated has valid and marketable title to the shares of capital stock of The Pullman Company deliverable hereunder and has the legal right and power and all authorization and approval required by law to sell, assign and transfer such shares pursuant

hereto and that such delivery will pass title to such shares free and clear of any lien, claim, encumbrance or equity.

7. Prior to the effective date of the Registration Statement referred to in Paragraph 5, Pullman Incorporated and The Pullman Company shall enter into an underwriting agreement in customary form, not inconsistent with the provisions hereof, with the undersigned and such other underwriters as may be associated with the undersigned in the underwriting of the public sale of the shares of capital stock of The Pullman Company.

8. At the Delivery Date, Pullman Incorporated shall procure the resignations of the present board of directors and executive officers of The Pullman Company and shall cause the election of a new board of directors and officers to be designated by the undersigned, none of whom shall be directors, officers, employees or stockholders of Pullman Incorporated.

9. Prior to the Delivery Date, Pullman Incorporated shall cause The Pullman Company to operate its business in the manner in which it is presently being operated and to maintain its property in good operating condition, provided that The Pullman Company may dispose of any property not needed in the operation of such business and may dispose of all or any light weight sleeping cars and light weight composite cars owned by The Pullman Company and except that Pullman Incorporated may cause The Pullman Company to pay ordinary or liquidating dividends, provided that at the Delivery Date The Pullman Company shall have current assets over and above all current liabilities, excluding undetermined liabilities in respect of which funds are deposited under the Escrow Agreement referred to in Paragraph 3, of not less than $2,500,000.

10. The method of disposition by Pullman Incorporated of the capital stock of The Pullman Company contemplated

hereby shall be approved prior to the effective date of the registration of the capital stock of The Pullman Company by the District Court of the United States for the Eastern District of Pennsylvania, in Civil Action No. 994, and either sixty days shall have elapsed after the date of the entry of such order without any appeal therefrom having been perfected or all parties to such action shall have consented to the entry of such order.

The "Delivery Date" shall be a date not later than ten days after the date (hereinafter called the "Completion Date") upon which the conditions required to be performed prior to the Delivery Date as set forth in Paragraphs 2, 4, 5, 7, 9 and 10 shall have been completed.

This agreement may be terminated at any time prior to the expiration of twenty-four hours after the Completion Date by such number of underwriters as have agreed to purchase in the aggregate fifty per cent or more of the number of shares of capital stock of The Pullman Company deliverable hereunder, if the market value of securities in general or political, financial or economic conditions shall have so materially changed after the date of this proposal as, in the judgment of such underwriters, to render it inadvisable to make a public offering of shares of capital stock of The Pullman Company. This agreement may be terminated at any time prior to the Delivery Date by such number of underwriters as have agreed to purchase in the aggregate fifty per cent or more of the number of shares of capital stock of The Pullman Company deliverable hereunder, if The Pullman Company shall have sustained a substantial loss by labor strikes, fire, flood, accident or other calamity which, in the judgment of such underwriters, shall render it inadvisable to proceed with the delivery of said shares of capital stock of The Pullman Company, whether or not said loss shall have been insured and The Pullman Company agrees to notify the undersigned promptly of any such loss. Any termination of this agreement pursuant to this paragraph shall be without liability of either party to the other party.

We intend forthwith to submit this proposal, by way of petition, to the United States District Court for the Eastern District of Pennsylvania, in Civil Action No. 994, for an order authorizing Pullman Incorporated to execute a formal agreement with the undersigned in accordance with the terms of this proposal.

Very truly yours,

GLORE, FORGAN & CO.
By C. F. GLORE.